STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Fitzgerald, PJ and Bandstra and Kelly, JJ

ANNABELLE R. HARVEY, Beneficiary and successor of Paul Harvey, deceased, and MICHAEL F. MERRITT, Judge, retired, substituted for Bruce A. Fox, Judge, retired.

Plaintiffs-Appellees,

v

STATE OF MICHIGAN, STATE OF MICHIGAN DEPARTMENT OF MANAGEMENT AND BUDGET, STATE OF MICHIGAN BUREAU OF RETIREMENT SYSTEMS AND THE JUDGES' RETIREMENT BOARD FOR THE STATE OF MICHIGAN, JOINTLY AND SEVERALLY,

Defendants-Appellants.
_____/

Supreme Court No. 121672

Court of Appeals No. 227140

Ingham Circuit No. 94-77760-AZ
(Formerly on remand from Court of Appeals No. 187112)

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The thrust of the Plaintiffs-Appellees' Brief is that Defendants-Appellants should have the burden of proving that the equal protection clause found in Const 1963, art 1, § 2 has not been violated. However, it is the Plaintiffs who must overcome the presumption that all statutes are constitutional under the rational basis test.

The Plaintiffs have failed to establish that the retirement benefits granted them by the Judges Retirement Act (Act), 1992 PA 234, MCL 38.2101 *et seq.*, and local retirement systems, when compared to the benefits granted to 36th District Court judges, discriminates unfairly against them in violation of the equal protection clause. It is important to remember that Judge Fox, one of the original Plaintiffs in this matter, was dropped from the lawsuit because he received greater retirement benefits under the combination of the Act and his local retirement system. It is also important to note that local retirement systems can provide many different benefits to their members such as medical coverage, which are not freely provided to retirees under the Act.

Plaintiffs ask the Court to review this matter by looking at other judges in other districts. This matter, however, involves only the two Plaintiffs, since Plaintiffs dropped their request to have this matter certified as a class action. Only the facts regarding the local and state retirement benefits guaranteed to these two Plaintiffs must be examined by the Court to determine if a violation of Michigan's equal protection clause has occurred.

Finally, Plaintiffs ask this Court to order Defendants to pay them the same retirement allowance paid to retirees from the 36th District Court. This Court has previously held that such monetary relief may not be granted because only the Legislature has such authority. Thus this Court should reverse the decision of the Court of Appeals.

ARGUMENT

I. Defendants have submitted relevant and admissible evidence

Plaintiffs argue that the legislative history of the Court Reorganization Act of 1980, 1980 PA 438 through 443 (Court Act of 1980) is "irrelevant, inadmissible and should be disregarded". (Plaintiffs' Brf, p. 1) Plaintiffs attack Defendants' exhibits because they want to have a few paragraphs of the Judges Retirement Act reviewed out of context, in an attempt to prove that the entire Act is unconstitutional. This "review in a vacuum" is improper, since the foundation for the legislation upon which the Act was based must be considered to determine the constitutionality of the Act.

Legislative analyses are relevant to deciding the constitutional issue presented. As stated in *Seaton v Wayne County Prosecutor,* 233 Mich App 313, 321 n 3; 590 NW2d 598 (1998):

> We recognize that legislative bill analyses are not official statements of legislative intent. Nevertheless, bill analyses may be of probative value. See, e.g., *North Ottawa Community Hosp v Kieft,* 457 Mich 394, 406 n 12; 578 NW2d 267 (1998); *Nemeth v Abonmarche Development, Inc.,* 457 Mich 16, 27-29; 576 NW2d 641 (1998).

The intent of the legislature is always important in deciding equal protection questions, and the legislative histories submitted by the Defendants are relevant to the constitutionality of the Act. See *State ex rel Wayne County Prosecuting Attorney v Levenburg*, 406 Mich 455; 280 NW2d 810 (1979) As stated in *Neal v Oakwood Hospital Corporation,* 226 Mich App 701, 716-716; 575 NW2d 68 (1997), citing this Court's decision in *Frame v Nehls,* 452 Mich 171, 183; 550 NW2d 739 (1996):

> When a statute is challenged as being violative of equal protection, a court should consider the provisions of the whole law, as well as its object and policy.

II. The Discrete Exception to a General Rule Test is no longer viable

Neither Plaintiffs nor Defendants have found any recent cases where the intermediate scrutiny test has been used in matters where "a discrete exception to the general rule" issue is presented. In spite of this, Plaintiffs argue that the intermediate test is still valid. However, *Walsh v Walsh,* 2001 Mich App Lexis 1275, Michigan Court of Appeals, Docket No. 222434 (July 31, 2001), the Michigan Court of Appeals in an unpublished opinion held that the courts have extinguished the "discrete exception" rule. (A copy of *Walsh* is in Defendant's Appendix at 106a) In *Walsh*, the Plaintiffs attempted to have the Court use the "discrete exception to the general rule" test found in *Manistee Bank*, but the Court of Appeals correctly refused to apply it.

Plaintiffs misinterpret the holding in *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 575 NW2d 68 (1997), as to the continued viability of the intermediate scrutiny test in matters not involving fundamental rights or suspect classifications. While the Court of Appeals mentions the "discrete exception to a general rule" test found in *Manistee Bank & Trust Co v McGowan,* 394 Mich 655; 232 NW2d 636 (1975), the Court never states that the test is still viable, or that it applies in anything other than common-law negligence cases. *Neal*, *supra* at 718

The Court of Appeals held in *Neal* that, even if the "discrete exception to a general rule" test is still viable, it only applies in cases involving fundamental rights or suspect classifications. *Id* at 718 In addition, the "discrete exception to a general rule" test was established in a common-law negligence case (*Manistee Bank*), and it does not apply to socio-economic cases like this one.

In the 28 years since *Manistee Bank,* the Defendants have not found any reported cases in Michigan where the "discrete exception to a general rule" test has been used. While *Neal* and two other cases reference this test (out of almost 125 cases that contain a citation to *Manistee*

Bank), the test was not used in those decisions and none of the cases held that the test was still viable.

Manistee Bank introduced the intermediate scrutiny test to Michigan jurisprudence and the Defendants agree, that the intermediate scrutiny test is still used in very limited cases. Defendants, however, never agreed, as argued by Plaintiffs, that the "discrete exception to a general rule" test was still viable. Therefore, the intermediate scrutiny test is not the proper equal protection test to be used in this purely economic matter. The rational basis test is the only test that is appropriate.

III. The Rational Basis Test is the only test to use in this economic matter

This Court and the Court of Appeals have limited the intermediate scrutiny test, and it clearly should not be used in this matter. Plaintiffs base their argument that the intermediate scrutiny test should be used on two theories: 1) the Court of Appeals used it in *77th District Judge v State of Michigan,* 175 Mich App 681; 438 NW2d 333 (1989), and 2) because the issue of retirement benefits granted to district court judges is "mundane" to the general populous, it is not an important social or economic matter worthy of the rational basis test. (Plaintiff's Brf, p 6)

Neither theory has merit. In *77th District Judge,* the Court of Appeals held that the Plaintiff did not have an available remedy and dismissed the case. Only in dicta did the Court of Appeals say that the intermediate scrutiny test should be used. While the Michigan residents may, in fact, view the issue of district court judges retirement benefits not worthy of discussion, that is not a test that has been mentioned in any case but *77th District Judge.* (i.e. the newsworthiness of an issue determines the level of scrutiny) The issue is whether the statute

discriminated against Plaintiffs by paying them less than 36th District Court retirees. This is clearly an economic matter, and should be decided using the rational basis test.

IV. The Constitution guarantees both local and state retirement benefits

The Plaintiffs want this Court to believe that while the Act guarantees retirement benefits to judges throughout the state, non-36th District Court judges could have their local pensions reduced or eliminated. Const 1963, art 9, § 24 provides otherwise:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby. (Emphasis added)

All local retirement plans, such as the Bay County Retirement System (BCRS) for Plaintiff Harvey and the Municipal Employees' Retirement System (MERS) for Plaintiff Merritt, must pay accrued financial benefits to their members. They just cannot walk away from their obligations.

When Plaintiffs Harvey and Merritt were on the bench, they each had a local retirement system that guaranteed pension benefits to them upon retirement. The judges of the newly created 36th District Court in 1980, however, had no local retirement system that would guarantee pension benefits to them, as neither the Wayne County Retirement System nor the City of Detroit Retirement System provided any retirement benefits. Without any local retirement system guaranteeing pension benefits to them, the Legislature stepped in and provided the only option that would guarantee retirement benefits to the 36th District Court bench, placing all the judges solely within the Judges Retirement System (JRS).

Contrary to the Plaintiffs accusations in their Brief (p. 15), the Legislature's decision to place the entire 36th District Court bench solely with JRS and not creating a new local system or

forcing some local retirement system to include these judges does not evidence intentional discrimination by Defendants towards other District Court judges. The Plaintiffs have two retirement systems that guarantee their pension benefits, the Act and BCRS or MERS while 36th District Court judges have one, the Act. This certainly that does not constitute intentional discrimination or a violation of the Equal Protection Clause.

Plaintiffs also argue, that because the Legislature cannot control what benefits a local retirement system provides, this Court should not take into consideration the entire pension scheme for judges which includes both benefits under the Act and a local retirement system. (Plaintiffs Brf, p 16) While the Legislature does not control what benefits a local retirement system may provide, benefits from a local retirement system may not "be changed at the whim of the local unit of government offering the benefit" as argued on page 16 of Plaintiff's Brief. Const 1963, art 9, § 24 does not allow local benefits to be diminished or impaired, so Plaintiffs' arguments are totally without merit.

Plaintiffs cite *Rassner v Federal Collateral Society, Inc.,* 299 Mich 206; 300 NW2d 45 (1941) and *Judicial Attorneys Association v State of Michigan,* 459 Mich 291; 586 NW2d 894 (1998) to support their position that only the state retirement allowance instead of the entire retirement benefits provided through the local and state retirement systems should be examined to determine if an equal protection violation has occurred. Neither case stands for the proffered position.

Rassner and *Judicial Attorneys* did not involve constitutionally guaranteed retirement benefits from both the state and the local retirement system. *Rassner* involved a due process claim, and *Judicial Attorneys* involved a separation of powers argument. Here, both Plaintiffs have constitutionally guaranteed retirement benefits from the state and the local retirement

system. Therefore the Plaintiffs do not rely on the kindness of the local system for their local benefits, but instead on the constitutional guarantee that pension benefits from the local retirement system cannot be impaired or diminished.

V. Plaintiffs' requested relief is a larger retirement allowance which this Court may not provide

Despite their claims to the contrary that they are simply seeking declaratory and injunctive relief, Plaintiffs seek money damages from the State. A declaratory judgment that the JRS violates the equal protection clause does not offer any of the relief that they truly seek, and neither does an injunction that stops the operation of the JRS that could halt retirement benefits to all retired judges and their beneficiaries.

Plaintiffs want this Court to order the State to pay them a higher retirement allowance, yet refuse to concede that this constitutes money damages. They continue to argue that this is simply injunctive relief. But the payment of more money is clearly money damages. This is quite evident in the Plaintiffs' Brief beginning on page 29. Sub-argument C truly illuminates the relief that Plaintiffs want:

> "In this case, this Court may order Defendants to pay retirement benefits to Plaintiffs equal to those paid to retired Judges and beneficiaries of retired Judges of the 36th District Court.... (Emphasis added)

Plaintiffs want money paid to them from the state, and that is not permitted by Const 1963, art 1, § 2. While Plaintiffs cite the recent cases of *Sharp v City of Lansing,* 464 Mich 792; 629 NW2d 873 (2001) and *Lewis v State of Michigan,* 464 Mich 781; 629 NW2d 868 (2001), they fail to cite the most relevant and important holding in *Sharp,* 464 Mich at 809, where this Court stated in footnote 15:

> Consistent with our holding today in *Lewis, supra,* we reiterate that judicial authority under the state Equal Protection Clause is limited to providing injunctive or declaratory relief to nullify unconstitutional legislation or otherwise stop a recurring violation of the state Equal Protection Clause. As discussed in *Lewis*, because of the language of the state Equal Protection Clause, any provision for compensatory relief or similar measures to positively *implement* the clause requires legislative action. (emphasis added)

Since Plaintiffs are seeking compensation from the state for the alleged equal protection violation pursuant to Const 1963, art 1, § 2, they cannot obtain this relief without legislative action.

Plaintiffs further argue that they are not seeking money damages because the Judges Retirement System is "over funded" actuarially at this time, and the money damages they seek do not require an appropriation by the Legislature. (Plaintiff's Brf, p 34) However, the Legislature is statutorily mandated to make appropriations to ensure that the retirement fund maintains a sufficient balance to pay all statutorily required benefits:

> [T]he legislature shall annually appropriate to the retirement system the amount determined under subsection (2) in order to fund the retirement system on an estimated basis for the fiscal year for which the appropriation is made. The legislature shall annually appropriate to the retirement system the amount determined under subsection (3) in order to reconcile the estimated appropriation needed to adequately fund the system for the previous fiscal year. [MCL 38.2302]

In other words, if a judgment is entered against Defendants, it is the Legislature that will be required to appropriate additional State funds to make up for any amount paid as a judgment.

In addition, if the expenditures of the JRS exceed its receipts, Const 1963 art 9, § 24 requires the State to pay whatever is necessary to ensure that the JRS can fulfill its contractual obligation to provide a pension. *Musselman v Governor,* 448 Mich 503; 533 NW2d 237 (1995), on rehearing 450 Mich 574 (1996).

The Plaintiffs argue that the JRS is currently "over funded" and that, as a result, they intimate that there is little likelihood that the Legislature will ultimately be forced to provide

additional funds to the retirement system. This argument ignores the fact that the ultimate responsibility to keep the JRS properly funded is the Legislature's.

Plaintiffs rely on a misinterpretation of this Court's holding in *City of Adrian v Michigan,* 420 Mich 554; 362 NW2d 708 (1985) and *Musselman, supra,* claiming that, if there is a "pool of funds" available to the Defendants, a judgment can be paid out of that "pool of funds" without encroaching on the Legislature's appropriation function. While *Musselman* makes a short reference to "a pool of funds available to be transferred to the reserve of health benefits," there is nothing in either *Musselman* or *Adrian* that provides that a "pool of funds", that has been appropriated by the Legislature, can be awarded to the Plaintiffs or any party seeking monies for an alleged violation of the equal protection clause.

If Plaintiffs are successful in their request for money to be paid to them from the state to equal that paid to 36th District Court retirees and Plaintiffs continue to receive benefits from their local retirement system, they will receive a higher retirement allowance than 36th District judges. This result will not solve the problem, since then 36th District Court judges may have an equal protection claim. As a result, only the legislative has the authority and ability to solve the alleged problem of unequal retirement allowances.

Thus, the current retirement scheme of local and state guaranteed retirement benefits to the Plaintiffs and the limitation of 36th District Court judges to only the JRS is not violative of the Equal Protection Clause, and should be upheld by this Court.

Defendant's also argue that the Plaintiffs appendix be stricken as the appendix contains documents that were never submitted below and not in the record.

Respectfully submitted,

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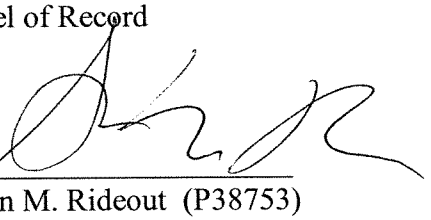

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